Petition

81-1415

No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ROBERT BUTTERWORTH, As Sheriff
of Broward County, Florida,
Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS ELEVENTH CIRCUIT

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QUESTION PRESENTED

I. Whether the limited exception for bingo contained in the gambling statutes of the State of Florida is "criminal-prohibitory" in nature, rather than "civil-regulatory", and therefore enforceable on the Respondent Tribe's reservations.

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1. Opinion of the Court of Appeals for the (former) Fifth Circuit rendered in this action on October 5, 1981. (Reported at 658 F.2d 310.)

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(FORMER FIFTH CIRCUIT)

OPINIONS BELOW

The following Opinions of the lower courts are germane to this Petition:

1. Opinion of the United States Court of Appeals for the (former) Fifth Circuit, rendered October 5, 1981, in this action. A verbatim transcript of same is set forth in the Appendix attached hereto. (658 F.2d 310)

2. Opinion of the United States District

Court for the Southern District of Florida, rendered May 6, 1980, in this action. Said opinion is reported at 491 F.Supp. 1015 (1980).

JURISDICTION

The Opinion herein sought to be reviewed was rendered by the Court of Appeals on October 5, 1981. Jurisdiction for such review is conferred upon the United States Supreme Court by 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

1. 67 Stat. 590 (1953) -

   "The consent of the United States is hereby given to any other state not having jurisdiction (over Indian tribes) with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to assumption thereof."

2. Section 285.16, Florida Statutes (1961)--

   "(1) The State of Florida hereby assumes jurisdiction over criminal offenses committed by or against

"Indian or other persons within Indian reservations and over civil causes of action between Indians or other persons or to which Indians or other persons are parties rising within Indian reservations.
(2) The civil and criminal laws of Florida shall obtain on all Indian reservations in this state and shall be enforced in the same manner as elsewhere throughout the state."

3. Chapter 849, Florida Statutes (1979).

4. Section 849.093, Florida Statutes (1979). A verbatim recitation of said Section appears in footnote 1 of the Fifth Circuit Opinion. (See Appendix.)

STATEMENT OF THE CASE

This matter had its origin in an action commenced by the Seminole Tribe of Florida (hereinafter the "Tribe" or "Respondent") in the United States District Court for the Southern District of Florida seeking to enjoin the Sheriff of Broward County (hereinafter the "Sheriff" or "Petitioner") from enforcing Florida's bingo statute (Section 849.093, Florida Statutes) on the Tribe's reservation in said county. Jurisdiction was properly vested in that court pursuant to 28 U.S.C.

Section 1362. On May 6, 1980, said court rendered its Judgment permanently enjoining the Sheriff from enforcing the subject statute on the reservation; the court concluded, as its basis for such judgment, that the statute in question was "civil/regulatory" in nature rather than "criminal/prohibitory", and was therefore not enforceable on the reservation.

The Sheriff thereupon timely appealed to the (former) Fifth Circuit Court of Appeals, which on October 5, 1981, rendered its Mandate and Opinion affirming, with one dissent, the District Court's permanent injunction. The majority of the Court founded its affirmance on the similar ground that the Florida bingo statute was "civil/regulatory."

The Sheriff now files this Petition for Writ of Certiorari asserting that the matter involves an important question of federal law which has not been, but should be, settled by this Court. Further, the decision sought to be reviewed conflicts with the decision of another federal court of appeals.

ARGUMENT

This Court should grant its Writ of Certiorari to review the decision of the Court of Appeals because said decision sanctions and permits Respondent as well as Florida's citizens and visitors to play bingo on the Tribe's reservations for unlimited prize monies in contravention and frustration of Florida's legislative intent as expressed in its gambling statutes.

Florida's bingo law is contained within Chapter 849 of the Florida Statutes, which Chapter is captioned "Gambling." Section 849.093, the bingo section, is an exception to the general prohibition against gambling activities, and permits bingo to be conducted by certain organizations under carefully defined conditions and limitations. A reading of the subject statute leaves no doubt that bingo as discussed therein is "gambling" and, as such, is punishable by fine and/or imprisonment unless conducted (a) by a

qualifying organization and (b) in strict conformance with the prize and other limitations that are specifically delineated.

As recognized by the Court of Appeals below, in attempting to determine whether a given law is to be classified as "regulatory" or "prohibitory", courts should look to the legislative intent of the enacting state. However, upon making that initial inquiry in the instant case, and although citing certain language from the Florida Supreme Court's decision in the case of Carroll v. State, 361 So.2d 144 (Fla. 1978), the Court of Appeals failed to acknowledge and recite the most significant commentary made in Carroll:

> "Recognizing the vice of lotteries, which infests the whole community, and the mischief or nuisance of gambling generally, the legislature has written into (the bingo section) stringent limitations against abuse."

Further, in commenting on the purpose and general thrust of the classification allowing the limited conduct of bingo by qualifying organizations, Florida's highest court stated

that "this is for the general welfare and removes bingo profits from the purview of organized gambling." It is difficult to perceive of any clearer expression of legislative intent that the subject statute is "prohibitory" in nature than that as determined and enunciated in the foregoing quoted Florida Supreme Court pronouncements.

The Opinion herein sought to be reviewed directly conflicts with the case of United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). There, in a federal prosecution through the Assimilative Crimes Act, the defendants were convicted of possessing unmarked, unclassified, and dangerous fireworks in violation of Washington law. In affirming the convictions, the court stated:

> "We conclude that Washington's fireworks law is a prohibitory rather than a regulatory law. Even though the Washington scheme allows for limited exceptions (i.e., for public displays and movies) (emphasis supplied) its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law."

Continuing, the court concluded that:

> "The possession of fireworks is not the same situation encountered in other regulatory schemes such as hunting or fishing where a person who wants to hunt or fish merely has to pay a fee and obtain a license. The purpose of such statutes is to regulate the described conduct and to generate revenue. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens. Moreover, by allowing appellants to operate their stands on the reservation or in any federal enclave would entirely circumvent Washington's determination that the possession of fireworks is dangerous to the general welfare of its citizens." (At p. 1364.)

Similarly, the clear purpose of the Florida gambling statute is a legitimate effort to promote the safety and health of all citizens. The State Legislature of Florida has determined that gambling is dangerous to the general welfare of all citizens; to permit the Tribe to conduct "unlimited" bingo on its reservation would entirely circumvent that determination.

Further, in analyzing the Marcyes case, supra, it is interesting to note that the

Washington fireworks statute in question there, in addition to the exceptions recited above, provided for licensing or permitting and required an investigation, as a predicate to issuance of a permit, to determine "whether the proposed display is of such a character and will be so located that it may be hazardous to property or dangerous to any person." If that law is deemed to be "prohibitory", notwithstanding such licensing requirements, rather than "regulatory", then it seems self-evident that Florida's bingo law -- without any corresponding licensing provisions -- is certainly no less the same.

To say that a person (whether Indian or non-Indian) -- although prohibited by virtue of Florida law from playing bingo for unlimited prize money anywhere else in that state -- can merely go "across the street" to the reservation and play for whatever prize the Tribe chooses to offer is to place the Tribe above the law and to undermine the public purpose and objectives sought to be implemented

through Florida's gambling laws.

As succinctly noted by the District Court in Rincon Band of Mission Indians v. County of San Diego, 324 F.Supp. 371 (S.D. Calif. 1971) reversed on other grounds, 495 F.2d 1 (9th Cir. 1974):

> "It would be as unlawful and as destructive of the full and equal citizenship of Indian citizens to exempt them from (local) laws on gambling as it would be to deny them the specific benefits of (such) laws solely because of their Indian status." (At p. 375.)

Indeed, the decision of the Court of Appeals herein sought to be reviewed has the very effect of exempting the Respondent Tribe from the prohibitions and limitations of a specific portion of Florida's criminal laws on gambling.

Significantly, Section 849.46 -- the very last section of the Florida Gambling Chapter -- states as follows:

> "It is deemed by the Legislature that this chapter is necessary for the more efficient and proper enforcement of the statutes and laws of this state prohibiting lotteries and gambling, and a lawful exercise

"of the police power of the state for the protection of the public welfare, health, safety and morals of the people of the state. All the provisions of this chapter shall be liberally construed for the accomplishment of these purposes."

The Court's conclusion that the subject statute is regulatory, rather than prohibitory, is supported neither by case law, by the statutes, nor by logic.

CONCLUSION

If permitted to stand, the decision of the Court of Appeals will permit the Respondent to maintain mini-gambling sanctuaries within its reservation borders throughout the State of Florida, and will permit the Tribe to thereby reap the fruits of bingo enterprises that are otherwise clearly prohibited by Florida law. Correspondingly, Florida's citizens and visitors alike -- whether non-Indian or Indian -- have been sanctioned by said decision with the right to engage in bingo on the reservations at the prospect of large

monetary prizes, in frustration of this state's legislative determination that gambling is contrary to the public health, safety and welfare.

For the reasons expressed hereinabove, Petitioner respectfully urges this Court to grant its Writ of Certiorari to review the subject decision of the Court of Appeals.

Respectfully submitted,

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Appendix

SEMINOLE TRIBE OF FLORIDA, an Organized Tribe of Indians, as recognized under and by the Laws of the United States, Plaintiff-Appellee,

v.

Robert BUTTERWORTH, the duly elected Sheriff of Broward County, Florida, Defendant-Appellant.

No. 80-5496

United States Court of Appeals,
Fifth Circuit.*
Unit B

Oct. 5, 1981

Seminole Indian tribe of Florida brought declaratory judgment and injunction action concerning application of Florida bingo laws to operation of bingo hall on the Indian reservation. The United States District Court for the Southern District of Florida, Norman C.

*Former Fifth Circuit case, Section 9(1) of Public Law 96-452-October 14, 1980.

Roettger, Jr., J., 491 F.Supp. 1015, rendered judgment for the tribe, and appeal was taken. The Court of Appeals, Lewis R. Morgan, Circuit Judge, held that: (1) statute permitting bingo games to be played by certain qualified organizations and subject to state restrictions is "civil/regulatory" rather than "criminal/prohibitory" and, hence, cannot be enforced against the tribe, and (2) Indians as well as non-Indians may play bingo at the tribal facility.

Affirmed.

Roney, Circuit Judge, filed dissenting opinion.

1. Indians § 32

States lack jurisdiction over Indian reservation activity until granted such authority by the federal government. Act Aug. 15, 1953, § 1 et seq., 67 Stat.

588; 18 U.S.C.A. § 1162, 28 U.S.C.A §§ 1360, 1360 note; West's F.S.A. § 285.-16.

2. Federal Courts § 386

Language in Florida Supreme Court opinion suggesting that the state legislature has chosen to regulate bingo was not binding on federal court in determining whether bingo statute was regulatory or prohibitory for purpose of its application to playing of bingo on Indian reservation. Act Aug. 15, 1953, § 1 et seq., 67 Stat. 588; 18 U.S.C.A. § 1162; 28 U.S.C.A. §§ 1360, 1360 note; West's F.S.A. §§ 285.16, 849.093.

3. Indians § 32

Florida bingo statute is "civil/regulatory" rather than "criminal/prohibitory" in nature and, hence, cannot be applied against the Seminole Indian tribe of Florida; where the state regulates

operation of bingo halls to prevent the game of bingo from becoming a money-making business, the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed, notwithstanding that the statute contains penal sanctions. Act Aug. 15, 1953, § 1 et seq., 67 Stat. 588; 18 U.S.C.A. § 1162; 28 U.S.C.A. §§ 1360, 1360 note; West's F.S.A. §§ 285.16, 849.-093; West's F.S.A. Const. Art. 10, § 7.

4. Indians § 32

For purpose of application to Indian reservation activity, legislative intent determines whether a state statute is regulatory or prohibitory. Act Aug. 15, 1953, § 1 et seq., 67 Stat. 588; 18 U.S.C.A. § 1162; 28 U.S.C.A. §§ 1360, 1360 note: West's F.S.A. § 285.16.

5. Indians § 32

State public policy determines whether an activity is prohibited or regulated and whether state control can be exercised over such activity when carried on on an Indian reservation. Act Aug. 15, 1953, § 1 et seq., 67 Stat. 588; 18 U.S.C.A. § 1162; 28 U.S.C.A. §§ 1360, 1360 note; West's F.S.A. § 285.16.

6. Indians § 32

Not only can Florida bingo statute not be enforced against the Seminole Indian tribe of Florida, but the Indians are not required to distinguish between Indians and non-Indians and prohibit non-Indians from playing. Act Aug. 15, 1953, § 1 et seq., 67 Stat. 588; 18 U.S.C.A. § 1162; 28 U.S.C.A. §§ 1360, 1360 note; West's F.S.A. §§ 285.16, 849.08, 849.-09(1)(b), (2), 849.093; West's F.S.A.

Const. Art. 10, § 7.

7. Federal Courts § 611

As a general rule, the Court of Appeals need not address issues raised for the first time by a party on appeal.

Appeal from the United States District Court for the Southern District of Florida.

Before MORGAN, RONEY and KRAVITCH, Circuit Judges.

LEWIS R. MORGAN, Circuit Judge:

This appeal involves a question arising under Public Law 280, the federal law permitting states to exercise civil and criminal jurisdiction over the Indian tribes. All parties agree that the case turns on the determination of whether Florida Statute Section 849.093-which permits bingo games to be played by

certain qualified organizations subject to restrictions by the state-is civil/ regulatory or criminal/prohibitory in nature. If the statute is civil/ regulatory within the meaning of Bryan v. Itasca County, 426 U.S. 373, 96 S.Ct. 2102, 48 L.Ed.2d 710 (1976), the statute cannot be enforced against the Seminole Tribe of Florida.

This lawsuit commenced when the Seminole Indian tribe brought an action under 28 U.S.C. §§ 2201 and 2202, seeking a declaratory judgment and injunctive relief against Robert Butterworth, the sheriff of Broward County,Florida. The Seminole tribe had contracted with a private limited partnership that agreed to build and operate a bingo hall on the Indian reservation in exchange for a percentage of the profits as management

fees. Anticipating violation of the Florida bingo statute, Sheriff Butterworth informed the tribe that he would make arrests for any violations of Fla.Stat. § 849.093.[1] The attorney general of the

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1. The Florida bingo statute provides as follows:

849.093 Charitable, nonprofit organizations; certain endeavors permitted

(1) As used in this section:

(a) "Bingo game" means and refers to the activity commonly known as "bingo" wherein participants pay a sum of money for the use of one or more cards. When the game commences, numbers are drawn by chance, one by one, and announced. The players cover or mark those numbers on the cards which they have purchased until a player receives a given order of numbers in sequence that has been preannounced for that particular game. This player calls out "bingo" and is declared the winner of a predetermined prize. More than one game may be played upon a bingo card, and numbers called for one game may be used for a succeeding game or games.

(b) "Bingo card"means and refers to the flat piece of paper or thin paste-board employed by players engaged in

state of Florida filed a petition on behalf of the state seeking leave to participate in the case as amicus curiae, and leave was granted. Relying on stipulated facts, the parties filed cross motions for summary judgment, presenting

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the game of bingo. More than one set of bingo numbers may be printed on any single piece of paper.

(2) None of the provisions of this chapter shall be construed to prohibit or prevent nonprofit or veterans' organizations engaged in charitable, civic, community, benevolent, religious, or scholastic works or other similar activities, which organizations have been in existence for a period of 3 years or more, from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games, less actual business expenses for articles designed for and essential to the operation, conduct, and playing of bingo, shall be donated by such organizations to the endeavors mentioned above. In no case shall the net proceeds from the conduct of such games be used for any other purpose whatsoever. The proceeds derived from the conduct of bingo games

the question to the district court, 491 F.Supp. 1015, whether the statute could be enforced against the Indian nation. After finding that the case satisfied the "case or controversy" requirement of the Constitution, the district judge granted

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shall not be considered solicitation of public donations.

(3) If an organization is not engaged in efforts of the type set out above, its right to conduct bingo or guest games hereunder shall be conditioned upon the return of all the proceeds from such games to the players in the form of prizes. If at the conclusion of play on any day during which a bingo or guest game[1] is allowed to be played under this section there remain proceeds which have not been paid out as prizes, the nonprofit organization conducting the game shall at the next scheduled day of play conduct bingo or guest games without any charge to the players and shall continue to do so until the proceeds carried over from the previous days played have been exhausted. This provision in no way extends the limitation on the number of prize or jackpot games allowed in one night as provided for in subsection (5).

the plaintiff's motion for summary judgment on the ground that the statute in question was regulatory in nature and therefore could not be enforced against the Indian tribe. The lower court enjoined the sheriff from enforcing the statute against the plaintiff. The

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(4) The number of days during which such organizations as are authorized hereunder may conduct bingo or guest games per week shall not exceed two.

(5) No jackpot shall exceed the value of $100 in actual money or its equivalent, and there shall be no more than one jackpot in any one night.

(6) There shall be only one prize or jackpot on any one day of play of $100. All other game prizes shall not exceed $25.

(7) Each person involved in the conduct of any bingo or guest game must be a resident of the community where the organization is located and a bona fide member of the organization sponsoring such game and shall not be compensated in any way for operation of said bingo or guest game.

(8) No one under 18 years of age shall be allowed to play.

sheriff of Broward County and the State of Florida appealed the lower court's decision to this court, but agreeing with the lower court, we affirm its decision.

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(9) Bingo or guest games shall be held only on the following premises:

(a) Property owned by the nonprofit organization;

(b) Property owned by the charity or organization that will benefit by the proceeds;

(c) Property leased full time for a period of not less than 1 year by the nonprofit organization or by the charity or organization that will benefit by the proceeds;

(d) Property owned by and leased from another nonprofit organization qualified under this section; or

(e) Property owned by a municipality or a county when the governing authority has, by appropriate ordinance or resolution, specifically authorized the use of such property for the conduct of such games.

(10) Any organization or other person who willfully and knowingly violates any provision in this section is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For a second or subsequent offense, the organization or other person is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

I. Can Indians Operate Bingo Halls?

[1] The states lack jurisdiction over Indian reservation activity until granted that authority by the federal government; however, Sections 2 and 4 of Public law 280[2] granted certain states the right to exercise criminal jurisdiction and limited civil jurisdiction over the Indian tribes. Section 7 of

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2. The two sections were codified at 18 U.S.C.A. § 1162 and 28 U.S.C.A. § 1360, respectively. The first section concerned state assumption of criminal jurisdiction and the second involved assumption of civil jurisdiction. These sections were directed at the willing states of California, Minnesota, Nebraska, Oregon and Wisconsin (later adding Alaska), which are sometimes referred to as the mandatory states because the assumption of jurisdiction was dictated by the statute.

the Act[3] granted to other states the right to assume criminal and civil jurisdiction by legislative enactment, and although this section was repealed in 1968 by Section 403(b) of Public Law 90-284, any cessions of jurisdiction made pursuant to the Act prior to its repeal were not affected. Pursuant to the former Public Law 280 the state of Florida assumed criminal jurisdiction over reservation Indians in Fla.Stat. § 285.16. By this enactment, Florida

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3.67 Stat. 590 (1953) (repealed by Pub.L. 90-284, Title IV, § 403.82 Stat. 79 (1968). The former section provided:

> The consent of the United States is hereby given to any other state not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this act, to assume jurisdiction at such time and in such manner as the people of the state shall by affirmative legislative action obligate and bind the state to assumption thereof.

The repeal changed the law to require the consent of the Indians to any further assumption of jurisdiction.

assumed jurisdiction over the Indians to the full extent allowed by the law.

In Bryan v. Itasca County, supra, 426 U.S. at 383, 96 S.Ct. at 2108, the Supreme Court of the United States interpreted Public Law 280 as granting civil jurisdiction to the states only to the extent necessary to resolve private disputes between Indians and Indians and private citizens. In Bryan the petitioner Indian sought relief from a personal property tax that the state had levied against his mobile home. The Court interpreted the language of Section 4(a) of Public Law 280[4] providing for civil jurisdiction as follows:

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4. See note 2 supra. Section 4(a) provides:

(a) Each of the States or Territories listed ... shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country ... to the same extent

> [S]ubsection (a) seems to have been primarily intended to redress the lack of Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes....[The statute] authorizes application by the state courts of their rules of decision to decide such disputes. Id. at 383-84, 96 S.Ct. at 2108.

After further discussion the Court concluded that "if Congress in enacting Pub.L. 280 had intended to confer upon the States general civil regulatory powers, including taxation over

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that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory....

reservation Indians, it would have expressly said so." Id. at 390, 96 S.Ct. at 2111. Although the Supreme Court was interpreting the language of Public Law 280 as directed at the six mandatory states, it is clear that these same limitations on civil jurisdiction would apply to a state that assumed jurisdiction pursuant to Section 7 of the former Public Law 280. Thus, the mandate from the Supreme Court is that states do not have general regulatory power over the Indian tribes.

The difficult question remaining in a case such as the present one is whether the statute in question represents an excercise of the state's regulatory or prohibitory authority. The parties have presented the question for decision to this court in that form, and several cases out of the Ninth Circuit have

addressed similar Indian problems with the same or a similar analysis. See United States v. Farris, 624 F.2d 890 (9th Cir. 1980); United States v. County of Humboldt, 615 F.2d 1280 (9th Cir. 1980); United States v. Marcyes, 557 F.2d 1361 (9th Cir. 1977). See also Santa Rosa Band of Indians v. Kings County, 532 F.2d 655 (9th Cir. 1975). Thus, under a civil/regulatory versus criminal/prohibitory analysis, we consider the Florida statute in question to determine whether the operation of bingo games is prohibited as against the public policy of the state or merely regulated by the state.

Fla. Stat. Section 849.093[5] provides that the general prohibition against lotteries does not apply to prevent "nonprofit or veterans'

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5. For the text of the statute, see note 1 supra.

organizations engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities ... from conducting bingo games or guest games, provided that the entire proceeds derived from the conduct of such games shall be donated by such organizations to the endeavors mentioned above." Id. Section 2 of the statute sets out conditions of operation for organizations not engaged in the charitable activities listed above. The remaining sections of the statute state restrictions for the operation of bingo games and penal sanctions for violation of those provisions.[6] Although the

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6. The statute as originally enacted contained no penal sanctions for its violation. The penalties were added by amendment in 1973, Laws 1973, c. 73-229, § 1. Arguably, the original enactment of the statute without penal sanctions indicates a legislative intent that the statute be construed as regulatory.

inclusion of penal sanctions makes it tempting at first glance to classify the statute as prohibitory, the statute cannot be automatically classified as such. A simplistic rule depending on whether the statute includes penal sanctions could result in the conversion of every regulatory statute into a prohibitory one. See United States v. Marcyes, supra, 557 F.2d at 1364. The classification of the statute is more complex, and requires a consideration of the public policy of the state on the issue of bingo and the intent of the legislature in enacting the bingo statute.

[2,3] The Florida Constitution provides: "lotteries, other than the types of pari-mutuel pools authorized by law..., are hereby prohibited in this state." Art. X, § 7, Fla.Const. The

legislature has the power to prohibit or regulate all other forms of gambling, and in Greater Loretta Improvement Ass'n. v. State ex rel. Boone, 234 So.2d 665 (Fla. 1970), the Florida Supreme Court recognized that bingo was one of the forms of gambling, along with horse racing, dog racing, and jai alai, excepted from the lottery prohibition and permitted to be regulated by the state. Based on the definition of "pari-mutuel" and the fact that the bingo statute was enacted the same year that the Constitution was revised, the court held that the bingo statute did not violate the Constitution of Florida. In a later constitutional challenge, Carroll v. State, 361 So.2d 144 (Fla. 1978), the Supreme Court of Florida stated that

> while the legislature cannot legalize any gambling device that would in effect amount

> to a lottery, it has an inherit [sic] power to regulate or to prohibit any and all forms of gambling. In exercising this power to regulate, the legislature, in its wisdom, has seen fit to permit bingo as a form of recreation, and at the same time, has allowed worthy organizations to receive the benefits. (citations omitted) (emphasis added) Id. at 146-47.

Although this language suggesting that the legislature has chosen to regulate bingo is not binding on this court as to whether the statutue is regulatory or prohibitory, the language indicates that the game of bingo is not against the public policy of the state of Florida. See also State v. Appelbaum, 366 So.2d 443(Fla. 1979) ("The statute ... regulates the conduct of bingo...."). Bingo appears to fall in a category of gambling that the state has chosen to regulate by imposing certain limitations to avoid

abuses. Where the state regulates the operation of bingo halls to prevent the game of bingo from becoming a money-making business,[7] the Seminole Indian tribe is not subject to that regulation and cannot be prosecuted for violating the limitations imposed.

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7. Arguably, the Florida bingo statute could be viewed as a narrow exception to the general prohibition against lotteries, permitting bingo operations only when the activity was recreational or charitable, and not for profit. Under this view urged by petitioner, professional, money-making bingo operations continue to be prohibited. Even if we were to accept this view of the statute as prohibiting professional bingo, the Seminole Indian tribe could arguably qualify as a nonprofit organization "engaged in charitable, civic, community, benevolent, religious or scholastic works or other similar activities" as prescribed in the statute. The Seminole's [sic] complaint alleges that the profits received by the tribe from the bingo activities are to be invested for the betterment of the Indian community. Although the Indian nation may not qualify as a charitable organization, within the letter of the statute, the Seminole tribe could be said to fall within the spirit of its permissive intent.

[4] In holding that the bingo statute in question is regulatory, we must address two Ninth Circuit cases in which similar issues were raised. In United States v. Marcyes, supra, 557 F.2d at 1364, the Ninth Circuit held that a fireworks statute of the state of Washington was a prohibitory statute of the state, and therefore was necessarily included within the ambits of the Assimilative Crimes Act, 18 U.S.C. § 13. The fireworks statute, like the bingo statute in question, permitted the activity to take place under certain circumstances. Despite these exceptions, to the statute, however, the Ninth Circuit found that the statute's "intent was to prohibit the general possession and/or sale of dangerous fireworks" and that it was "not primarily a licensing law." Id. The lower court in the

present case relied on Marcyes for its discussion of the regulatory/prohibitory distinction, but distinguished the case based on the fact that fireworks are dangerous items that, if bought on an Indian reservation, can be carried off of it. The operation of bingo halls, on the other hand, must necessarily remain on the reservation. Although the distinction is a legitimate one, the determination underlying it is a legislative decision which we are not at liberty to make. Instead we find that the real distinction between the cases lies in the reference to each state's law as to whether the statutes in question were prohibitory or regulatory. Legislative intent determines whether the statute is regulatory or prohibitory, and although the state of Florida prohibits lotteries in general, exceptions are made

for certain forms of gambling including bingo. All parties agree that forms of gambling such as horse racing are regulated in Florida, and indeed the petitioner admits that the Indians could engage in the operation of horse racing activities without interference by the state. Petitioner suggests that the distinction between bingo and horse racing lies within the licensing requirement; however, we find that argument without merit. Regulation may appear in forms other than licensing, and the fact that a form of gambling is self-regulated as opposed to state-regulated through licensing does not require a ruling that the activity is prohibited.

In a more recent and in some respects more similar case, United States

v. Farris, supra, 624 F.2d 890, the Ninth Circuit found that members of the Puyallup Indian tribe could not be prohibited from operating a gambling casino on the reservation because the state of Washington had not assumed jurisdiction over gambling offenses. However, in considering whether the provisions of 18 U.S.C. § 1955 of the Organized Crime Control Act of 1970 could apply to non-Indians gambling on the reservation, the Ninth Circuit analyzed the public policy of the state of Washington and determined that the state prohibited professional gambling. The court found that the "violation of a law of a state" requirement of section 1955 was intended to exempt from federal prosecution the operators of gambling business in states where gambling was not

contrary to the public policy of the state, and the legislative declaration in Washington's gambling statute indicated a clear legislative intent to prohibit professional gambling.[8] Specifically noting the exception of Florida fronton operators to the gambling provisions, the court reiterated that the federal statute could apply only in states where gambling was illegal. Washington, unlike Florida, was such a state, and thus the statute could be enforced against non-Indians gambling on the reservation. Cf. Rincon Band of Mission Indians v. County of

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8. The Wash.Rev.Code § 9.46.010 provides:

> It is hereby declared to be the policy of the legislature, recognizing the close relationship between professional gambling and organized crime, to restrain all persons from seeking profit from professional gambling activities in this state; [and] to restrain all persons from patronizing such professional gambling activities....

San Diego, 324 F.Supp. 371 (S.D. Calif. 1971), rev'd on other grounds, 495 F.2d 1 (9th Cir. 1974) (court held local ordinance prohibiting gambling was within ambit of phrase "laws of such state" of Public Law 280 so that gambling provisions could apply to Indians on the reservation).

[5] Although the Ninth Circuit found that the casino operation of the Puyallup Indians was a "violation of the law of a state" for which non-Indians could be prosecuted under the federal gambling law, the case supports the proposition that the state's public policy determines whether the activity is prohibited or regulated. Although the Florida Constitution, the Florida Supreme Court, and the Florida legislature have in various forms denounced the "evils of gambling," it is clear from the

provisions of the bingo statute in question and the statutory scheme of the Florida gambling provisions considered as a whole that the playing of bingo and operation of bingo halls is not contrary to the public policy of the state. Other courts prohibiting other forms of gambling have found those forms of gambling contrary to the public policy of the state. As the district court noted, this case presents a close and difficult question. The Supreme Court in interpreting Public Law 280 has stated that "statutes passed for the benefit of dependent Indian tribes ... are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Bryan v. Itasca County, supra, 426 U.S. at 392, 96 S.Ct. at 2112. Although the regulatory bingo statute may arguably be interpreted as prohibitory, the

resolution must be in favor of the Indian tribe.

II. Can Non-Indians Play?

[6,7] Although we have concluded that the Florida bingo statute cannot be enforced against the Seminole tribe, Sheriff Butterworth and the State of Florida petition this court for a ruling requiring the Seminole Indians to distinguish between Indians and non-Indians and abide by the restrictions of the statute as to non-Indians. It is not altogether clear how petitioner proposes that such distinctions practically could be made without prohibiting non-Indians from play or imposing the restrictions on all players, Indian and non-Indian alike. Furthermore, the relief sought continues to request the right to enforce regulation of the Indians operation of

bingo games. We reject petitioner's argument for these and the following reasons.

First, as respondent strongly points out, the argument was never presented below. The issue presented to the district judge on stipulated facts involved only the question of whether the statute could be enforced to prevent the Indians from violating its restrictions. As a general rule the court of appeals need not address issues raised for the first time by a party on appeal. See Adams v. Askew, 511 F.2d 700(5th Cir. 1975); D.H. Overmyer Co. v. Lofling, 440 F.2d 1213 (5th Cir. 1971). Furthermore, we note that the statute in question, Fla.Stat. § 849.093, makes no reference to violations of its restrictions by the players of bingo. Sheriff Butterworth

suggests that several general lottery prohibition statutes, such as Fla.Stat. §§ 849.08, 849.09(1)(b), and 849.09(2), permit the arrest of bingo players as players of illegal lotteries; however, we refuse to recognize in one breath that bingo is excluded from the general lottery prohibition and in the next permit the arrest of bingo players as players of illegal lotteries. The statutes cited must be considered in pari materia with the bingo statute permitting the operation of bingo games. The bingo statute does not prohibit the playing of bingo games in violation of its restrictions, and if the legislature of the state of Florida desires to prohibit such, then it must act accordingly. The courts that have prohibited Indians or non-Indians from gambling on reservations have done so in light of a statute that

specifically prohibits the act of gambling. In Florida, unlike in Washington, no distinction exists between Indians and non-Indians for the legality (or illegality) of certain gambling activities. Thus, petitioner's attempts to require the Seminoles to distinguish between Indian and non-Indian players are to no avail.[9] The decision of the

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9. The petitioner has cited a line of cases culminating in Washington v. Confederated Tribes, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), for the proposition that states can require Indians to apply state regulations to non-Indians who engage in activity on Indian reservations. Washington v. Confederated Tribes, supra, involved the imposition of a state sales tax on the purchase of cigarettes. The Court required an Indian smoke shop owner to pre-collect the tax imposed on the buyer. Although we recognize the validity of the line of caes cited, we note that an important distinction exists between the present case and those cases where regulations are imposed on non-Indians. In the present case the only regulation involved is directed at the Indian operators of the bingo hall, not its

lower court is

AFFIRMED.

RONEY, Circuit Judge, dissenting:

I respectfully dissent on the ground that the State of Florida has prohibited, not regulated, the precise kind of bingo operation which the plaintiff seeks to conduct. As a matter of fact, it is because such activity is prohibited in Florida that this business was started and is successful. The reasons that Florida laws prohibit such a bingo business, focusing on the indirect consequences of it, whether right or wrong, are as applicable to a bingo casino on the Indian reservation as they are to such a business off a reservation. If

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(continued from previous page) non-Indian bingo player. Thus, even if we were to fully address petitioner's argument, the line of cases cited would not require a contrary holding.

only Indians were involved, or if the effects of the bingo casino were shown to be confined to the reservation, the decisions relied upon by the Court might be applicable. Without such a showing, in my opinion, they are not. I would reverse.

Opposition

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ALEXANDER

No. 81-1415

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT BUTTERWORTH, as
Sheriff of Broward County, Florida,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA,

Respondent.

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT)

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QUESTION PRESENTED

I.

The question presented for the determination of the Supreme Court of the United States by the petition for the issuance of the Writ of Certiorari is whether or not the decision and judgment of the United States Court of Appeals of the Eleventh Circuit in this cause is in conflict with the opinion of another Court of Appeals on the same point of law and if so whether this Case presents to the Supreme Court of the United States a matter of great public importance.

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT)

INTRODUCTION

The Petitioner seeks to procure the issuance of the Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (former Fifth Circuit) upon the ground that the decision of the Court of Appeals decided a matter of great public importance and that the opinion is in conflict with the opinion of another Court of Appeals on the same point of law.

STATEMENT OF THE CASE

Two facts which we consider of importance do not appear in the Statement of the Case contained in the Petition.

First: The Seminole Tribe of Florida is an organized Tribe of Indians, as recognized under and by the Laws of the United States of America.

Second: The Tribe is admittedly an entity qualified under the bingo laws of Florida to operate bingo games, and is a member of the class of persons or charities specifically granted permission to conduct bingo.

ARGUMENT

The bingo statute, Section 849.093, F.S., was adopted by the legislature of the State of Florida in 1967. At the same session the legislature submitted a new Constitution to the electors of Florida for their approval or disapproval. Section 7, Article X of that Constitution (1968) reads:

> "Lotteries, other than the types of pari-mutuel pools authorized by law as of the effective date of this constitution, are hereby prohibited in this state."

The Constitution was approved by the people of Florida. The question then arose whether or not the statute authorizing bingo was a prohibited lottery under the constitutional provision. This brought for determination by the Supreme Court of Florida, the court of last resort in the State, the question of whether the public safety and welfare, thus guarded by this State Constitution, condemned bingo and rendered the bingo statute unconstitutional.

The Supreme Court of Florida answered this question in the case of *Greater Loretta Improvement Association v. State, ex rel., Boone, 234 So. 2d 665,671 (Fla. 1970),* as follows:

> "Although the term pari-mutuel is usually considered a method of betting on horse racing, it should be noted that this form of betting has been authorized for dog racing and Jai Alai. At the horse tracks, dog tracks and frontons, all the money paid for gambling tickets are placed in a common fund and paid to the winners less certain portions

reserved for taxes to the State and fees due the track of fronton for operating expenses and for profit. The greater amount invested in tickets, the greater amounts one may win if his choice is correct.

Bingo is similar. The player may usually purchase and play on as many cards as may be desired. The greater amount invested in cards the greater is the chance of winning. In both racing events and in Bingo games the hope of winning money prizes is not the only motive for attendance. In both instances entertainment, recreation, and social relations are factors of concern to many and just as important as the process of participating in the betting.

At the time the Constitution of 1968 was being prepared and approved by the Legislature, our lawmakers simultaneously authorized the regulation of Bingo. It seems unreasonable to conclude that the people in adopting the Constitution intended to permit some citizens to continue their betting at the race tracks and at the same time prohibit other citizens from continuing their Bingo games at social gatherings.

In view of the fact that Bingo could be considered the same type of gambling as described in the definition of pari-mutuel, the game of Bingo was 'authorized by law as of the effective date of the Constitution of 1968.'

Obviously, the makers of our 1968 Constitution recognized horse racing as a type of lottery and a 'pari-mutuel pool' but also intended to include in its sanction those other lotteries then legally functioning; namely, dog racing, jai alai and bingo. All other lotteries including bolito, cuba, slot machines, etc., were prohibited. The view that bingo was intended to be included in the exception to the constitutional prohibition against lotteries is more persuasive when the bingo statute, Fla. Stat., § 849.093, F.S.A., is examined and found to contain such stringent limitations against abuse.

The pros and cons of the moral issue involved in Bingo is a matter of legislative, not judicial, concern. We are only confronted with the possible violation of our organic law.

> For the reasons stated above, it does not appear that the members of the Legislature, who are directly responsible to the people, violated the provisions of the Constitution in authorizing and regulating the game of Bingo. Certainly, the Legislature in one breath did not intend to authorize Bingo and in the next breath prohibit it in a proposed Constitution."

The Chief Justice, in specially concurring in that opinion, points out that whether or not bingo is "inimical to the public welfare" is for the legislature to decide, and he specifically states that the Court leaves to the legislature and to the future "the question whether legalized and regulated bingo should be continued or its legalization repealed." (*Id.* at 673)

Since December, 1979, the legislature has met on three separate occasions, and is in session now. Throughout this period bingo has been operated by the Seminole Tribe of Florida. The legislature has not seen fit to make any more indicating the bingo game operated by the Seminole Indians is inimical to the public welfare.

The Federally recognized Seminole Indian Reservation is located within the bounds of Broward County, Florida., Adjoining is Dade County, Florida. Within a radius of 25 miles of the Reservation there is one harness track conducting pari-mutuel wagering, four thoroughbred race tracks conducting pari-mutuel wagering, four jai-alai frontons conducting pari-mutuel wagering, one quarter-horse race track that conducts pari-mutuel wagering, and three dog tracks conducting pari-mutuel wagering. The insignificant bingo game which the Supreme Court of Florida says is a pari-mutuel operation conducted by the Seminole Tribe of Florida has an infinitesimal impact and does not present a question of great importance.

It is contended by the Petitioner that the Supreme Court of the United States of America should grant its discretionary Writ of Certiorari in this case because of a conflict between the opinion

of the United States Court of Appeals for the Eleventh Circuit, in the case sub judice and the opinion of the *United States v. Marcyes, 557 F.2d 1361 (9th Cir., 1977)*, enunciated by the United States Court of Appeals for the Ninth Circuit.

The cardinal rule to determine whether opinions of other Circuits of the Federal Courts are in conflict with the ruling under review is that the general language of those opinions "must be read in connection with the facts." *White v. Aronson, 302 U.S. 16, 58 S.Ct. 95 (1937).*

As to questions controlled by State law, however, conflict among Circuits is not of itself a reason for granting a Writ of Certiorari. Conflict which may be merely corollary is the permissible difference of opinions in the State Courts. *Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 58 S.Ct. 860 (1938).*

The difference between the subject matter in the case of *United States v. Marcyes, supra*, and the subject matter in the case sub judice, prevents all possibility of a conflict between the two opinions.

In *United States v. Marcyes, supra*, the State of Washington prohibited possession and ownership of "dangerous fireworks," although there was some display of fireworks permitted under certain controlled circumstances. Certain Indians, in Indian Country wholly within the State of Washington, set up stands for the sale to Washington residents of dangerous fireworks, which could and would be transported outside of the Reservation and which carried by their very nature a serious danger to those who might come into contact with an explosion of the fireworks. By the very nature of the substance involved and the danger posed, it was obvious that the statute was intended to prohibit the possession and sale of an admittedly dangerous substance.

On the other hand, the opinion of the United States Court of Appeals for the Eleventh Circuit, in the case at bar, recognized

that the conduct of bingo was merely another pari-mutuel operation. Pari-mutuel operations are permitted but regulated in the State of Florida. Violation of the regulations can bring criminal penalties. These penalties are included to insure the enforcement of the regulation, but such penalties do not convert the civil regulatory law into a criminal prohibitory law. *Bryan v. Itasca Cty., Minnesota, 426 U.S. 373, 96 S.Ct. 2101 (1976).* In that case the Supreme Court of the United States said:

> ". . . Today's congressional policy toward reservation Indians may less clearly than in 1953 favor their assimilation, but Pub. L. 280 was plainly not meant to effect total assimilation. Pub. L. 280 was only one of many types of assimilationist legislation under active consideration in 1953. H.R. Rep. No. 848, pp. 3-5; Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 633 (CA 9, 1975). And nothing in its legislative history remotely suggests that Congress meant the Act's extension of civil jurisdiction to the States should result in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than 'private, voluntary organizations,' United States v. Mazurie, 419 U.W. 544, 557 95 S.Ct. 710, 718, 42 L.Ed 2d 706 (1975) — a possible result of tribal governments and reservation Indians were subordinated to the full panoply of civil regulatory powers, including taxation, of state and local governments. The Act itself refutes such an inference: . . ."

Chapter 550 and Chapter 551 of the Florida Statutes permits, but regulates, the operation of other pari-mutuel games such as horse racing, dog racing, harness horse racing, quarter horse racing and jai alai. Section 550.16, Florida Statutes, provides that pari-mutuel wagering "is permitted within the enclosures of any horse racetrack and dog racetrack licensed and conducted under this law, but not elsewhere in this state. . .".

Section 550.25, Florida Statutes, condemns as a misdemeanor the operation of an unauthorized race meet. Persons involved in the operation of a race meet "not in conformity with

this Chapter shall be guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.".

The imposition of a criminal penalty for the violation of these regulations does not render the statute criminal-prohibitory rather than civil-regulatory. This in effect is conceded by the Petitioner.

As pointed out by the United States Court of Appeals for the Eleventh Circuit in its opinion in this case "All parties agree that forms of gambling such as horse racing are regulated in Florida, and, indeed, the Petitioner admits that the Indians could engage in the operation of horse racing activities without interference by the State."

This binding admission weighs heavily against the contention that the subject matter involved here poses a problem of great public importance. Moreover, this admission seems a clear recognition that the conduct of bingo games is not contrary to the public policy of the State of Florida. The concession that all forms of pari-mutuel wagering regulated by the State of Florida could be engaged in by the Indian Nation without interference by the State leave no logical basis to contend that bingo is or should be the exception because of its importance or because it is contrary to the public policy of the State of Florida.

The Petitioner filed its Petition for the issuance of the Writ of Certiorari on the 90th day after the rendition of the judgment of the United States Court of Appeals for the Eleventh Circuit. This petition was returned to the Petitioner for his failure to comply with Rule 33 of the Appellate Rules of the Supreme Court of the United States. The Rule appears to permit the Petitioner to promptly file a revised petition complying with the Rule. (Id. subsection .7.) It does not appear to contemplate the inclusion in the revision of additional arguments in support of the petition on jurisdiction.

The last paragraph on page 10 of the revised petition, including the citation and quotation from Section 849.46, Laws of Florida, was not included in the initial rejected petition. If this additional argument is permissible, under the above circumstances, we respectfully suggest that Section 849.46, Laws of Florida, is in no wise applicable to the bingo statute. Section 849.46, Laws of Florida, was a part of Chapter 29712 of the Laws of Florida enacted in 1955. This Chapter dealt with forfeiture of vessels, vehicles, gambling paraphernalia and outlines the procedure for accomplishing such a forfeiture. That Chapter enacted in 1955 is composed of Section 849.35 through 849.46. The provision of Section 849.46, Florida Statute, is only applicable to that Chapter, which, as we have pointed out, deals solely with the confiscation of property or paraphernalia used in gambling.

The enactment of the bingo statute was in 1967 and forms no part of Chapter 29712 of the Laws of Florida of 1955.

CONCLUSION

The primary question presented by the Petition is not whether the bingo law of Florida is criminal-prohibitory or civil-regulatory. It is a question of whether the Supreme Court of the United States should assume jurisdiction of this case because of the alleged conflict and because of the contention that it is in conflict with the decision of another Circuit Court of Appeals and presents a matter of great public importance. We respectfully submit that on both points the Petition fails to make a case for the issuance of a Writ of Certiorari by the Supreme Court of the United States. We also think it is palpable that the Florida bingo law is civil-regulatory like all other pari-mutuel laws of this State.

The tenor of the Petition for Writ of Certiorari merely seeks to give the defeated party in the Circuit Court of Appeals another hearing. In the case of *Magnum Import Company v. Cody, 43 S.Ct. 531,532 (1923)*, this is an impermissible purpose.

Respectfully submitted,

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